Supreme Court, U.S.
FILED
APR 11 2001

No. 00-1273

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

SDDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondent SDDS's brief in opposition confirms that the decision below departs from fundamental principles of state sovereignty. SDDS's basic argument against review is its assertion that States *may* be deemed to waive Eleventh Amendment immunity by participating in litigation, and that, in any event, federal-court judgments overriding that immunity should not be treated as void. As we explained in the petition, however, these arguments are inconsistent with decisions both of this Court and of other courts of appeals. Because the Eighth Circuit's holding creates considerable confusion in areas of great practical importance, further review is essential.

A. SDDS's Account Of The Proceedings Below Should Not Obscure The Eighth Circuit's Holding That A State Waives Its Eleventh Amendment Immunity By Engaging In Litigation

SDDS's account of the procedural background of this case attempts to create the impression that the State was inexcusably manipulative or dilatory in raising its Eleventh Amendment arguments. Although these contentions have no direct bearing on the legal issues presented here, it is worth noting that they are misleading in several significant respects.

First, SDDS is wrong in contending that the State, in a calculated attempt to "ma[k]e free use of the federal courts whenever doing so suits its purposes" (Br. in Opp. 5), expressly consented to (or acquiesced in) the exercise of federal jurisdiction over the claims at issue here. See Br. In Opp. 3-7. The State and its officers did not voluntarily invoke federal jurisdiction; they simply responded to the Commerce Clause claims advanced against them in *SDDS VI*. See Pet. 3; compare, *e.g.*, *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring). To be sure, in doing so the State's attorneys failed expressly to contest the assertion of federal jurisdiction over the State itself. But that oversight is, perhaps, understandable: because the federal court unquestionably had *Ex Parte Young* jurisdiction to resolve claims that the 1991 ballot referendum was unconstitutional – claims that were advanced against South Dakota officers sued

in their official capacities – the fact that the complaint also named the State was of limited practical importance.

In contrast, the State and its officials have vigorously contested the exercise of federal jurisdiction over claims that could effectively require South Dakota to pay money damages – that is, the claims that were advanced in *SDDS VIII* and that are principally at issue in this petition. As SDDS itself acknowledges (at Br. in Opp. 3), the State's answer to the complaint expressly invoked the Eleventh Amendment "to the extent that [the complaint] can be construed to involve a claim for monetary relief." See Pet. 7 n.3. The State went on to argue this point at length to the Eighth Circuit in *SDDS VIII. In re SDDS, Inc.*, No. 96-2705 (CA8), Resp. Br. 12-13. As a consequence, SDDS plainly is wrong in suggesting that this is a case in which the State tried to "manipulate federal courts and litigants by, first, consenting to suit, then litigating to achieve a desired result, and finally, after the litigation is done and the judgments are final, withdrawing its consent." Br. in Opp. 14.

Second, SDDS also is incorrect in arguing that this Court's denial of the State's petition for certiorari in *South Dakota* v. *SDDS, Inc.*, No. 97-1378, has any bearing on the current petition. The questions presented in No. 97-1378, which sought review of a decision of the South Dakota Supreme Court, concerned the *substantive* scope of the Eleventh Amendment and the res judicata effect of certain federal judgments on subsequent state-court proceedings; this case, in contrast, presents entirely different questions concerning *waiver* of Eleventh Amendment immunity and the scope of Rule 60(b)(4). In addition, SDDS's central grounds for opposing certiorari in No. 97-1378 were the arguments that the state-court decision was not yet final and that the federal questions in the case had not been addressed. No. 97-1378, Br. in Opp. 9-14. Neither of those arguments has any application here.

Third, SDDS misstates the basis of the Eleventh Amendment holding below. The Eighth Circuit did not, as

SDDS asserts, premise its decision on a finding of "an express waiver [that] was followed by acquiescence in three adverse final judgments." Br. in Opp. 11. Instead, the court of appeals declared that it was the State's "conduct" of litigation on the merits that effected the waiver of immunity. Pet. App. 4a-5a. Nor was it crucial to the court's finding of waiver in this latest proceeding that the Eighth Circuit's prior assertions of jurisdiction had become final; indeed, as we note in the petition (at 13 n.7), the authority cited by the Eighth Circuit as support for its waiver theory was a decision in which the State had asserted immunity during the course of the *initial* district court proceedings. The questions presented in the petition therefore come to this Court in stark terms: whether a State waives immunity by litigating the merits of the claim against it in federal court, and whether a party is barred from seeking review of a void judgment under Rule 60(b)(4) whenever the party did not first challenge that judgment by petitioning this Court for a writ of certiorari.

B. The Eighth Circuit's Erroneous Interpretation of Rule 60(b)(4) Is Inconsistent With Decisions Of Other Courts Of Appeals And Warrants Review

1. In defending the Eighth Circuit's construction of Rule 60(b)(4), SDDS argues principally that a judgment issued in violation of the Eleventh Amendment cannot be "void" within the meaning of the Rule because Eleventh Amendment immunity is waivable. Br. in Opp. 15-16. That reasoning, we note, was not the basis for the holding below, which turned on the Eighth Circuit's conclusion that Rule 60(b)(4) is inapplicable whenever the party seeking 60(b)(4) relief declined to first petition this Court for certiorari to overturn the challenged judgment. SDDS's new argument is, in any event, plainly inconsistent with this Court's precedents. As we noted in the petition (at 24), the Court settled long ago that, notwithstanding a sovereign's *ability* to waive its immunity, a judgment against the sovereign is void unless the sovereign actually *has waived* its immunity: "Consent alone gives

jurisdiction to adjudge against a sovereign. Absent that consent, *the attempted exercise of judicial power is void.*" *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940) (emphasis added). As we also noted, the Court went on to hold in *United States Fidelity & Guaranty* that a sovereign may not be bound by such a void judgment. See *id.* at 514-515. SDDS makes no response to this point.

Indeed, even where collateral attacks on judgments are involved (and as we explain below, the attack on the judgment in this case is direct rather than collateral), the judgment is "void if it * * * was issued in contravention of a * * * sovereign immunity. * * * [Such judgments] remain subject to collateral attack if recognition or enforcement is sought either in the jurisdiction where reached or in another jurisdiction." 18 MOORE'S FEDERAL PRACTICE § 130.04[3], at 130-15, 130-16 (Matthew Bender ed. 2000). For this reason, the usual res judicata and collateral estoppel rule – which bars collateral attack on a court's determination of its own jurisdiction – "is not applicable in actions against a sovereign where the officials who represent the sovereign in the action *are not empowered to waive the immunity of the sovereign or to bind the sovereign by litigating the question of its immunity.*" RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 96, cmt. a (1971) (emphasis added) (citing *United States Fidelity & Guaranty).* As a consequence, so long as the State did not waive its Eleventh Amendment immunity here, the challenged judgments are void within the meaning of Rule 60(b)(4).

2. The other arguments that SDDS asserts against review of the court of appeals' Rule 60(b)(4) holding are insubstantial. *First*, SDDS argues, as the Eighth Circuit held, that recourse to Rule 60(b)(4) is foreclosed by the State's failure to petition this Court for certiorari to review the challenged judgments. Br. in Opp. 16-17. As we explain in the petition (at 22-25), however, nothing in Rule 60(b)(4) makes pursuit even of a direct appeal from the void judgment – let alone the filing of *a petition for certiorari in this Court* – a prerequisite for relief under the

Rule. Indeed, imposition of such a requirement would run directly contrary to the rationale for the Rule, which is that a void judgment is a "nullity"; for this reason, although motions for relief from judgment brought pursuant to *other* sections of Rule 60(b) must be filed within a "reasonable" time, "[a] motion under Rule 60(b)(4) challenging a judgment as void is subject neither to the 'reasonable' time requirement * * * [nor] to the equitable doctrine of laches, but rather may be made at any time." 12 MOORE'S FEDERAL PRACTICE, § 60.44[5][a], at 60-150, 60-151. Again, SDDS makes no response to this point.[1]

Second, SDDS argues that the State was obligated to seek certiorari directly from the Eighth Circuit's decision in *SDDS VIII* – presumably, in SDDS's view, in lieu of *ever* seeking relief under Rule 60(b)(4) – because the court of appeals held in *SDDS VIII* that it had jurisdiction to decide the claim against South Dakota, and a court's express determination of its jurisdiction ordinarily is not subject to collateral attack. Br. in Opp. 17-18. But this argument is wrong on two scores. To begin with, as we explained in the petition (at 23-24), a challenge under Rule 60(b)(4) is "direct, not collateral," *Watts* v. *Pinckney*, 752 F.2d 406 (9th Cir. 1985), and the rule of jurisdictional finality invoked by SDDS simply has no application to direct attacks on judgments. SDDS makes no attempt to deal with this point. In addition, as we note above, *United States Fidelity & Guaranty* holds that an erroneous determination of jurisdiction may *not* bind a sovereign, even in proceedings that really *are* collateral. See also *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963). There accordingly is nothing in the

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[1] The authorities cited by SDDS at Br. in Opp. 17 offer it no support. *Ackerman* v. *United States*, 340 U.S. 193 (1950), involved a request for relief from judgment pursuant to Rule 60(b)(6), not Rule 60(b)(4). The judgment in *Ackerman* thus was *not* void, making the decision irrelevant here. *Federated Dept. Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), concerned rules of res judicata, rather than those governing direct attacks on judgments pursuant to Rule 60(b)(4), and also did not concern a judgment that was void.

Eighth Circuit's jurisdictional holding that bars recourse to Rule 60(b)(4).

Third, SDDS is wrong in contending that there is no conflict in the circuits on the proper construction of Rule 60(b)(4). In the petition (at 21-23), we cited decisions of the Fifth, Sixth, and Ninth Circuits holding that Rule 60(b)(4) relief *is* available even when the movant failed to first appeal the challenged judgment. Those courts expressly rejected the approach taken by the Eighth Circuit here. SDDS's only attempt to distinguish those decisions is its observation that two of them did not involve the Eleventh Amendment, and that the Eleventh Amendment analysis used by the third has been undermined by more recent doctrine. This argument, however, entirely misses the crucial point. For present purposes, the relevant holdings of the Fifth, Sixth, and Ninth Circuits are that parties *may* invoke Rule 60(b)(4) even when they did not appeal the challenged judgment; the relevant holding of the Eighth Circuit is that parties may *not* invoke Rule 60(b)(4) in such circumstances. None of these courts regarded the *reason* that the challenged judgment was void as having any bearing on the Rule 60(b)(4) analysis.[2] Review to resolve this conflict therefore is necessary.

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[2] SDDS is wrong in suggesting that the Sixth Circuit's decision in *Kovacevich* v. *Kent State University*, 224 F.3d 806 (6th Cir. 2000), somehow impliedly overrules the aspect of *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), that conflicts with the decision below. See Br. in Opp. 18. *Kovacevich* recognized that Eleventh Amendment immunity is waivable, but it went on to reaffirm that the immunity may be raised at any point in the proceedings – and it dismissed on immunity grounds a claim that had been raised for the first time on appeal. Other claims were allowed to proceed only because they were brought pursuant to a federal statute, enacted to enforce the Fourteenth Amendment, that abrogated Eleventh Amendment immunity. 224 F.3d at 816. Nothing in this holding retreats from *Jordan*'s conclusion an appeal is not a prerequisite to invocation of Rule 60(b)(4).

Fourth, SDDS also is wrong in contending that review is unwarranted because Rule 60(b)(4) relief is appropriate only when there has been "'a plain usurpation of [judicial] power'" and that, because "the Eleventh Amendment does not automatically deprive the federal courts of original jurisdiction over a state," the Eighth Circuit's decision "was not [an] egregious usurpation of power." Br. in Opp. 19 (citation omitted). This reasoning, again, was not the basis for the decision below. And the argument is wrong on its own terms. The fact that Eleventh Amendment immunity *may* be waived surely does not mean that a judgment is insulated from attack when a court commits plain error by exercising jurisdiction over a State that has *not* waived its immunity. That, of course, is precisely what happened here.

C. This Court Should Review The Eighth Circuit's Holding That A State Waives Eleventh Amendment Immunity By Participating In Litigation

SDDS's arguments against review of the Eighth Circuit's Eleventh Amendment holding are insubstantial. SDDS does not deny that, to the extent that its claims are attempting to obtain monetary relief from the State, the "waiver" of immunity found by the Eighth Circuit is one that is implied from the State's conduct of litigation. And SDDS makes no attempt to explain away the disagreement in the courts of appeals about the rules governing implied waivers of Eleventh Amendment immunity. Against this background, SDDS offers no reason for the Court to deny certiorari.

1. SDDS's principal argument against review is the assertion that the State did waive its immunity. But this contention assumes its conclusion. Like the Eighth Circuit, SDDS premises its argument on the proposition that a State surrenders its immunity when its attorneys "voluntarily appear[] and participate[] on the merits of a case in federal court." Br. in Opp. 20. As we explained in the petition, however, this Court consistently has rejected this argument,

holding that "[t]he fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue." *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982) (plurality opinion).[3]

To escape this precedent, SDDS contends that, although Eleventh Amendment immunity may be raised at any time prior to final judgment, South Dakota may not now claim immunity in this case because the State failed to invoke the Eleventh Amendment until after "the conclusion of the proceedings in question." Br. in Opp. 21. Once again, as we explain above (at 3) and also noted in the petition (at 13 n.7), that was not the basis for the Eighth Circuit's holding; the court of appeals believed that waiver could be found simply because "'the State has made a general appearance in federal court and defended a lawsuit on the merits.'" Pet. App. 4a (citation omitted). Indeed, the asserted "finality" of *SDDS VIII could not* have been crucial to the holding below because South Dakota *did* assert its immunity prior to judgment, both in its answer to SDDS's complaint and in its argument to the Eighth Circuit in *SDDS VIII*. It may be added, however, that South Dakota would be entitled to assert its immunity now even had it failed to do so prior to issuance of the Eighth Circuit's mandate in *SDDS VIII*; courts of appeals routinely have held that States may invoke the Eleventh Amendment to challenge the enforcement of unappealed judgments that had long since become final. See, *e.g.*, *Saahir* v. *Estelle*, 47 F.3d 758, 762 (5th Cir. 1995).

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[3] Not surprisingly, the authorities cited by SDDS at Br. in Opp. 20 are inapposite. In *Clark* v. *Barnard*, 108 U.S. 436, 447-448 (1883), and *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273, 292 (1906), the State itself voluntarily *invoked* the jurisdiction of the federal court. And *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-282 (1959), involved an interstate compact, entered into by the State, that this Court construed to waive immunity. There is nothing remotely similar in this case.

2. SDDS's argument that the Court should disregard the South Dakota statute that prohibits state officials from waiving Eleventh Amendment immunity has no merit at all. SDDS's contention that the statute is ambiguous (see Br. in Opp. 21) is patently wrong; the provision provides, without exception, that "[n]o waiver of state immunity by statute or, where permitted, by any officer or agent of the state may constitute or be interpreted as a waiver of the state's immunity from lawsuits *in federal court*." S.D. CODIFIED LAWS § 3-21-10 (Michie 2000) (emphasis added). As we noted in the petition (at 11-12), this statute, with its express disapproval of attempted waivers by state officers, has *greater* clarity than the provision at issue in *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) – which the Court read to declare "an express preservation of [the State's] immunity from suit in federal court." SDDS also is incorrect in arguing that § 3-21-10 is inconsistent with a South Dakota law that permits the State's attorney general to defend the State "in any court." Br. in Opp. 21 (citing S.D. CODIFIED LAWS § 1-11-1(2)). In fact, as this Court has long held, such a general statutory reference to "courts" may not be interpreted to waive a State's immunity against suit in *federal* court. See, *e.g*, *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 3060).

SDDS's remaining argument – that § 3-21-10 is preempted by 42 U.S.C. § 1983 (see Br. in Opp. 22-24) – is frivolous. It doubtless is true that States may not, by statute, immunize state officials against liability under § 1983, and the various decisions cited by SDDS stand for that proposition. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 376-377 (1990). That hardly means, however, that federal law preempts state statutes that decline to *waive* a State's constitutional immunity. If that were the case, Eleventh Amendment immunity would be rendered nugatory.

3. Finally, we note that the recent grant of certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, confirms that review in this case likewise is warranted. *Mathias* presents the question whether a state regulatory commission's

"acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity"; the grant of certiorari suggests recognition of confusion in the courts of appeals about the scope of the Amendment. At the same time, it bears emphasis that it would *not* be appropriate for the Court to hold this case pending disposition of No. 00-878. The outcome in *Mathias*, which concerns the scope of *congressional* authority and the significance of state participation in a field that is regulated by Congress, will not control disposition of the Eleventh Amendment issue in this case – and will have no bearing at all on the Rule 60(b)(4) question. Holding the petition therefore would not obviate the need for ultimate review by this Court and would only delay final disposition of the case.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2001